Documation, Incorporated *and* James Phillip Cleveland *and* International Association of Machinists and Aerospace Workers, AFL-CIO. Cases 12-CA-8800-2, 12-CA-8935, 12-CA-8969, 12-CA-9010, 12-CA-9044(1), 12-CA-9044(2), and 12-CA-9148

August 26, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On October 19, 1981, Administrative Law Judge Henry L. Jalette issued the attached Decision in this proceeding. Thereafter, Respondent[1] and the General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions[3] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[4]

The Administrative Law Judge found that employees Richard Kise and David Thompkins were discriminatorily selected for inclusion in an otherwise lawful economic layoff in violation of Section 8(a)(3) and (1) of the Act. In so doing, he found that the General Counsel presented a *prima facie* case based on a showing of animus and the fact that these employees were senior to several others in their department who were retained. Contrary to the Administrative Law Judge, we find that the General Counsel has not established a *prima facie* case with respect to Kise and Thompkins. Thus, Respondent's officials testified without contradiction that Respondent has not and does not utilize seniority as a basis for selecting employees for layoff. Accordingly, we conclude that Respondent was under no obligation to do so here and its failure to do so cannot be used as evidence of discriminatory motive. Moreover, the Administrative Law Judge noted that Respondent presented evidence of specific instances in which Kise was disruptive, leading to his low rating for purposes of retention or selection for layoff, and noted that Thompkins' job performance may have had deficiencies. Although the Administrative Law Judge found these factors of little significance, we note that there is no evidence of job deficiencies with respect to any employee in the department who was retained. Based on the foregoing, we find the evidence here insufficient to establish that the selection of Kise and Thompkins for layoff violated the Act, and we shall amend the Administrative Law Judge's Conclusions of Law and recommended Order accordingly.

[1] Respondent also filed motions to strike the General Counsel's exceptions and brief in support thereof on the ground that they failed to fully comply with certain of the Board's Rules and Regulations. These motions are hereby denied as lacking in merit.

Respondent also filed a request for oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[2] Respondent and the General Counsel have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[3] The Administrative Law Judge found that Respondent applied its no-solicitation rule in a manner which was overly broad, and thus violated Sec. 8(a)(1) of the Act. In so finding, he relied on *Essex International, Inc.*, 211 NLRB 749 (1974), and, noting that *T.R.W. Bearings Division, a Division of T.R.W., Inc.*, 257 NLRB 442 (1981), had not issued at the time of the hearing, found it unnecessary to apply that decision in this case. While we agree that Respondent's application of its rule was unlawful under *Essex*, we disavow any implication in the Administrative Law Judge's Decision that, because *T.R.W.* was not issued until after the close of the hearing, he would have been precluded from applying it had the facts of this case called for it. To the contrary, it is the Board's established policy that, following the pronouncement of a new rule of law, it should be applied retroactively; that is, to the case in which it arises and to all pending cases. *Blackman-Uhler Chemical Division—Synalloy Corporation*, 239 NLRB 637 (1978).

Chairman Van de Water and Member Hunter note that, while they agree with the rule of retroactivity set forth in *Blackman-Uhler*, they find it unnecessary to pass on the Board's holding in *T.R.W.* since, both as interpreted by Respondent and as explained to the employees, Respondent's no-solicitation rule applied to breaktime and was thus overly broad under any view of the applicable law.

No exceptions were filed to the Administrative Law Judge's dismissal of the allegation that Respondent violated the Act by identifying employees Ingersoll and Gibbs in a memo to employees as having been the only employees who attended a Board representation hearing.

In agreeing with the Administrative Law Judge that the demotion of employee James Cleveland was not unlawful, we disavow his statement that it is questionable whether the General Counsel established a *prima facie* case by presenting evidence of Respondent's animus, union activity on Cleveland's part, and the timing of the demotion. Although we find that the General Counsel has established a *prima facie* showing of a violation, we nevertheless adopt the Administrative Law Judge's dismissal of this portion of the complaint since we conclude, based on his additional findings, that Respondent has rebutted the General Counsel's showing.

The Administrative Law Judge found, and we agree, that employee Craig Redman was discharged because of his union activities in violation of Sec. 8(a)(3) and (1) of the Act, and that Respondent's asserted defense, that Redman was discharged for insubordination when he made a remark to a fellow employee which was insulting to the Employer, was pretextual. Accordingly, we find it unnecessary to pass on the Administrative Law Judge's alternative rationale that the discharge was unlawful because even if Redman's remark was the motivating factor in the discharge, the remark was protected.

[4] In his recommended Order, the Administrative Law Judge required Respondent to remove from the personnel files of Cecelia Simmons, David Casto, and Jimmy Gibbs the "significant incident reports" issued to them because of their union activities. We shall modify the recommended Order to require Respondent also to expunge from its files any reference to Vicki Ingersoll's unlawful poor evaluation or the layoff which resulted from it. Further, in accordance with our decision in *Sterling Sugars, Inc.*, 261 NLRB 472 (1982), we shall order the expunction from Respondent's files of any reference to the unlawful discharges of Cecelia Simmons, Craig Redman, and David Casto.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 4:

"4. By discharging Cecelia Simmons, David Casto, and Craig Redman, by assigning Vicki Ingersoll to less desirable work, limiting the amount of her raise, and laying her off, and by taking these actions because of the union activities of the affected employees, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Documation, Incorporated, Palm Bay, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended order, as so modified:

1. Substitute the following for paragraph 2(e):

"(e) Rescind the unlawful significant incident reports issued to Cecelia Simmons, David Casto, and Jimmy Gibbs, and expunge from its files any reference to these reports, to Vicki Ingersoll's unlawful poor evaluation or the layoff which resulted from it, and to the unlawful discharges of Cecelia Simmons, David Casto, and Craig Redman, and notify all of the above-named employees in writing that this has been done and that evidence of these unlawful reports and unlawful discharges will not be used as a basis for future personnel actions against them."

2. Substitute the following for paragraph 1(j):

"(j) Discouraging membership in, or activities on behalf of, International Association of Machinists and Aerospace Workers, AFL-CIO, or any other labor organization of its employees, by laying off and/or discharging employees, by limiting the amount of employees' raises, by assigning employees to less desirable work because of their activities on behalf thereof, or otherwise discriminating in regard to the hire or tenure of employment or any terms or conditions of employment of its employees."

3. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all parties had the opportunity to present evidence it has been found that we violated the National Labor Relations Act, as amended, and we have been ordered to post this notice.

WE WILL NOT question employees about their union activities.

WE WILL NOT engage in surveillance of employees by following them on rest breaks.

WE WILL NOT create the impression that we are keeping employees' union activities under surveillance by telling them we know how many of them attended a union meeting.

WE WILL NOT solicit employee complaints and grievances and imply that we will remedy them in order to induce employees to withdraw their support from International Association of Machinists and Aerospace Workers, AFL-CIO.

WE WILL NOT prohibit employees from talking to other employees with whom they have no working relationship.

WE WILL NOT threaten to discharge employees for engaging in union activities.

WE WILL NOT maintain or enforce a rule which prohibits union solicitation and distribution of union literature during break or rest periods or periods when employees are privileged to stop working.

WE WILL NOT enforce any rule against solicitation and distribution of literature in a disparate manner against employees soliciting on behalf of the Union.

WE WILL NOT issue significant incident reports to employees for engaging in union activities.

WE WILL NOT discharge employees, nor lay off employees, nor transfer employees to less desirable work, nor limit the amount of employees' raises because of their activities on behalf of the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act.

WE WILL rescind the unlawful significant incident reports issued to Cecelia Simmons, David Casto, and Jimmy Gibbs, and expunge

from our files any reference to these reports, to Vicki Ingersoll's unlawful poor evaluation or the layoff which resulted from it, and to the unlawful discharges of Cecelia Simmons, David Casto, and Craig Redman, and notify all of the above-named employees in writing that this has been done and that evidence of these unlawful reports, the unlawful poor evaluation and resulting layoff, and the unlawful discharges will not be used as a basis for future personnel actions against them.

WE WILL offer Cecelia Simmons, David Casto, Craig Redman, and Vicki Ingersoll immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent jobs, without prejudice to their seniority or other rights and privileges, and WE WILL make them whole for any loss of pay they may have suffered by reason of their unlawful discharge or layoff, with interest.

WE WILL rate Vicki Ingersoll's job performance for the 6-month period preceding April 1980 in a manner, and under circumstances, free of unlawful considerations of union membership or activities, and WE WILL make her whole for any loss of pay she may have suffered by reason of the unlawful rating of April 3, 1980, with interest.

WE WILL assign Vicki Ingersoll to the duties she was performing on or before October 18, 1979, and WE WILL make her whole for any loss of pay she may have suffered by reason of her unlawful transfer, with interest.

DOCUMATION, INCORPORATED

DECISION

STATEMENT OF THE CASE

HENRY L. JALETTE, Administrative Law Judge: This consolidated proceeding involves allegations that the above-named Respondent violated Section 8(a)(1), (3), and (4) of the Act. The proceeding is based on the charges appearing in the caption above, pursuant to which complaints and orders consolidating cases were issued in due course.[1] On March 17–21, March 31, April 1, and July 15, 1980, hearing was held in Melbourne, Florida.

[1] The charge in Case 12–CA–8800–2 was filed on October 4, 1979, and complaint issued on November 8, 1979; the charges in Cases 12–CA–8935 and 12–CA–8969 were filed on December 26, 1979, and January 16, 1980, respectively, and a consolidated complaint issued on February 6, 1980; the charge in Case 12–CA–9010 was filed February 6, 1980, and amended on March 4, 1980; the charges in Cases 12–CA–9044–1 and 12–CA–9044–2 were filed on February 25 and 27, 1980, respectively, and consolidated with the prior cases by order on March 12, 1980. After hearing closed on these charges, a charge was filed in Case 12–CA–9148 on April 25, 1980, and complaint issued on May 23, 1980. On June 29, 1980, I granted the General Counsel's motion to consolidate and reopen the hearing.

FINDINGS OF FACT

I. THE FACTUAL SETTING

Respondent is engaged in the manufacture and sale of computer hardware in Melbourne, Florida, employing between 1,500 and 1,700 employees in March 1980, with 1,000 to 1,100 at its facility in Palm Bay, Florida, the facility where the unfair labor practices allegedly occurred.[2] In August 1979, some employees contacted a representative of the above-captioned Union and thereafter an organizational campaign was instituted.[3] The complaints allege that Respondent interfered with the campaign in a variety of ways.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The No-Solicitation/No-Distribution Rule*

On or about August 27, Respondent posted the following rule:

> EMPLOYEES ARE NOT ALLOWED TO ENGAGE IN SOLICITATION OF ANY KIND FOR ANY PURPOSE DURING WORKING TIME.
>
> EMPLOYEES ARE NOT ALLOWED TO DISTRIBUTE LITERATURE OF ANY KIND FOR ANY PURPOSE DURING WORKING TIME OR IN WORK AREAS.
>
> Violation of these rules will be cause for disciplinary action up to and including discharge.

The rule is, on its face, unlawful in light of the Board's Decision in *T.R.W. Bearings Division, a Division of T.R.W. Inc.*, 257 NLRB 442, decided July 31, 1981. However, at the time of the hearing, the rule of law was that which had been expressed in *Essex International, Inc.*, 211 NLRB 749 (1974), according to which the rule would be deemed lawful on its face inasmuch as the prohibitions contained therein against solicitation and distribution were limited to working time. Nevertheless, the General Counsel contended that the rule was unlawful because of the timing of its promulgation, the enforcement of the rule against employees on breaktime, and the disparate enforcement against union solicitation. I find merit in the General Counsel's contention and it is, therefore, not necessary to apply here the decision in *T.R.W. Bearings*.

Respondent contends that the rule is not new, but was rather a reiteration of an existing rule, a reiteration necessitated because of an upsurge in nonwork activity during working time. It contends further that, even if new, the promulgation of a valid rule upon the discovery of union activity during worktime is not unlawful.

In my judgment, it is immaterial whether the rule of August 27, 1979, was new or the reiteration of a rule previously promulgated, because the record supports a finding that the rule, as interpreted and enforced by Re-

[2] Jurisdiction is not in issue. Respondent admits, and I find, that it meets the Board's $50,000 direct outflow standard for the assertion of jurisdiction.

[3] Unless otherwise indicated, all dates hereinafter are in 1979.

spondent, was impermissibly broad. In sustaining the validity of a rule prohibiting solicitation and distribution during "work time" in *Essex International, Inc., supra*, the Board indicated clearly that such a rule was nevertheless invalid where it was established, in the context of a particular case, that the rule was communicated or applied in such a way as to convey an intent to restrict or prohibit solicitation during breaktime or other periods when employees were not actively at work.

In the instant case, the record indicates that the rule applied to breaktime. Thus, Respondent's vice president in charge of manufacturing, James Bloom, testified that, by working time, Respondent meant during scheduled working hours, which he further explained to mean from the start of the shift to lunchtime and the end of lunchtime to quitting time. Moreover, this was the message conveyed to employees. As Bloom testified, employees were told that Respondent could not afford interruptions during scheduled worktimes and were told on a number of occasions that, during lunchtime, and before and after scheduled work, they could engage in whatever activity they wanted. By clear implication, then, employees were told solicitation during breaktimes was prohibited.

Respondent would perhaps argue, however, that its rule was nevertheless valid because company rules did not provide for breaktimes. That is true only in the sense that company rules did not provide for formal or specified breaktimes. However, it is undisputed that it was company policy to permit employees to take breaks at their discretion.[4] At such times, employees were not actively working, nor expected to be, and under Board precedent they were free to engage in union solicitation absent a showing of business necessity.[5] Respondent made no such showing. It is true that Respondent offered opinion testimony as to the necessity for a broad no-solicitation rule, but it is not my understanding of the law that such opinion testimony is probative of business necessity. The testimony of Bloom and supervisors that coincident with the start of organizational activity they observed employees away from their work areas and circulating around talking to other employees may support a finding of business necessity. Such activity would tend to interfere with productivity. But, all breaktimes can be said to interfere with productivity to a degree and Respondent does not contend that it abolished its policy of discretionary breaks. In effect, Respondent's contention must be that employees who were engaged in union solicitation were abusing breaks. But Respondent did not limit its rule to abuses. It promulgated—reiterated if you will—a rule that applied to discretionary breaks. In the circumstances, the rule must be held to be impermissibly broad and violative of Section 8(a)(1) of the Act.

This does not mean that Respondent could not prohibit abuses; it means Respondent had the burden of showing in any given instance of solicitation that an abuse of privilege was involved. The record supports a finding, however, that Respondent was not so much concerned with abuses and loss of production as with impeding the organizational activity. For example, former employee John Keith testified that, on August 27, he passed out cards in his work area while taking a break. An hour later, he was called to Supervisor Dean Vernier's office where the no-solicitation/no-distribution rule was read to him. He was asked if he understood and he said yes, although he had never heard of the rule before. He asked why the rule was being read to him and Supervisor Vernier told him he understood Keith had been passing out literature that morning. Keith admitted he had. At the end of the conversation, Vernier told Keith it was a serious incident and that Keith could be terminated for it, that he had thought of writing up a significant incident report (Respondent's term for a written reprimand), but he did not think it was necessary.

Keith testified that during the conversation, Director of Manufacturing Howard Schuneman asked him if he had any cards on him. Keith said no. Schuneman asked him who had given him the cards and Keith said he had found them on a workbench.

It is noteworthy that this incident occurred on the very day the rule was "reiterated," that no mention was made by Vernier or Schuneman about breaktimes or interference with production. To the contrary, the inquiry was directed to finding out if Keith understood the significance of the cards. It appears that Keith dissembled about the nature of the cards and Schuneman deemed it important to explain to him that if they were signed they would authorize the Union to act in his behalf.[6]

On November 19, David Casto was given a reprimand by Alexander Cuthbertson, manager of quality control, for violating the no-solicitation rule. Cuthbertson would not tell him what time of day he was alleged to have violated the rule nor name the individuals solicited. It appears, however, that the individual was leadman Arthur Gilreath who testified that as he was leaving work, Casto, who was standing at the entrance to the department, asked him to sign a union card. Gilreath said no and kept walking. It was for this brief incident that Casto was reprimanded.[7] Gilreath testified that the work

[4] Breaks evidently included having casual conversations. For example, employee Linda Young, called as a witness for Respondent, when asked about the practice of employees coming by a machine and having a casual conversation, testified, "Well, it was done. Not for a very long time, but it was done." Brenda Wolf, also called as a witness by Respondent, gave similar testimony.

[5] *Daylin, Inc., Discount Division, d/b/a Miller's Discount Dept. Stores*, 198 NLRB 281 (1972).

[6] The complaint alleges that Vernier's remarks constituted an unlawful threat of discharge and Schuneman's questions about the cards constituted unlawful interrogation. Schuneman denied asking Keith if he had any cards or who gave them to him. I was not impressed by Schuneman and I credit Keith. It seems entirely plausible in the context of the conversation described that Schuneman would have asked Keith if he had any cards and where he got them. Such questioning in the context of a warning was clearly unlawful and violative of Sec. 8(a)(1) of the Act. As to Vernier's remarks, they were not denied because of Vernier's unavailability. (He was in Ireland at the time of the hearing.) Schuneman did not expressly deny that Vernier made the remarks attributed to him by Keith and, in effect, can be said to have admitted them when he testified that any threat of discharge was in the context of stating the rule which has been found to be unlawful. I find that Vernier's remarks were violative of Sec. 8(a)(1) of the Act.

[7] Respondent also adduced testimony from employees Carol Denton and Nancy Kracht that they were solicited by Casto as they passed by his work station. Implicitly at the very least, Respondent regarded such fleeting conversations as violative of its rule, else it would not have proffered the testimony. In doing so, Respondent demonstrated the true nature of its concern.

shift had started when this happened and Casto was away from his work station, but it is difficult to understand how Gilbreath knew this to be so since there are no timeclocks for employees to punch in and out. In any event, it is noteworthy that Respondent did not accuse Casto of being away from his work station.[8]

Employee Vicki Ingersoll testified that on February 1, 1980, as she was leaving the restroom she passed employees Roger Brown and Dave Thompkins. They spoke, she answered, and without breaking stride she continued to her work area. As she was doing so, Supervisor Roger Dabney approached her and told her she was looking for trouble. She explained about visiting the restroom and he repeated she was looking for trouble. She told her she had been standing out front at the bulletin board talking to two people she should not have been talking to. He told her to return to her work area, keep her nose clean and stay out of trouble, and not talk to anybody.

On February 4, Ingersoll met with Dabney's supervisor, Ralph Dorsett, to complain about Dabney. She repeated to Dorsett what had happened and Dorsett told her he understood she had been caught standing up front at the bulletin board talking to two people who were outstanding. Ingersoll asked him what he meant and Dorsett said, "Didn't they have a union T-shirt?" Ingersoll said yes, but she did not know she should not have spoken to them. Dorsett told her she was unfit to put herself in the limelight and that she should stay out of trouble and not talk to anybody with whom she did not have a working relationship.

The complaint alleges that in telling Ingersoll not to talk to employees with whom she had no working relationship Respondent promulgated an unlawful rule in that its purpose was to interfere with union activity, and that Dorsett threatened Ingersoll with reprisals if she said or did anything in support of the Union. Whether or not findings to such effect are warranted will be discussed below, but apart from those allegations the incident sheds much light on Respondent's purpose in invoking its no-solicitation rule.

At the outset, there is an issue of fact relative to what Ingersoll was doing that day and what Dabney said to her. According to Dabney, he did not tell her she was looking for trouble. All he did was ask her to return to her work area and she blew up in his face. At that point, he told her he did not want any trouble. Assuming this to be the case, Dabney left unexplained why he even asked Ingersoll to return to her work area. From his own testimony, he observed Ingersoll talking to two other employees about 150 feet away and he started to walk in her direction. He was still 30 feet away when she started walking towards her work area. Why, then, did he ask her to return to her work area? It is undisputed that company policy permitted Ingersoll to leave her work area to go to the restroom and this was what she had done. Surely, her brief conversation with two other employees, even as described by Dabney, did not call for any admonition. In my judgment, on Dabney's own testimony, his admonition can only be attributed to a belief that Ingersoll was talking to two other employees about the Union and an intention to stop such conversations.

In this connection, Dabney's credibility was seriously undermined by his saying that he did not know Ingersoll had anything to do with the Union. Only the day before, Respondent had issued a letter to its employees in which it referred to Ingersoll as one of those who would attempt to control things if the Union were voted in. In the circumstances, I cannot credit his version of the incident, but rather credit Ingersoll's. Her version indicates clearly that she was admonished not because she was away from her work area, but because she was talking to two union adherents.

As to Ingersoll's conversation with Dorsett, there is really no dispute about the critical part of the conversation; namely, whether or not Dorsett told her not to talk to people with whom she had no working relationship. As Dorsett testified, he told Ingersoll, ". . . don't be out talking to people that you don't have any business talking to or that you're not working with." In telling this to Ingersoll, I find, as alleged in the complaint, that Dorsett promulgated an unlawful rule for the purpose of interfering with union activity. As Ingersoll's testimony indicates, uppermost in Dorsett's mind was the identity of the individuals with whom Ingersoll was seen talking. Moreover, in telling Ingersoll to stay out of trouble, Dorsett impliedly threatened her with reprisals if she engaged in union activity.

James Gibbs, an active supporter of the Union, testified that on February 21, 1980, Supervisor Bruce Evans gave him a written reprimand for a soliciting incident on February 19. Evans would not tell him who he solicited. According to Gibbs' uncontradicted testimony, which I credit, the only incident he could recall on February 19 was a 30 second conversation with employee Angela Peterson wherein he asked her to sign a card as both were on their way to lunch.[9]

For another example, there is the treatment accorded Cecelia Simmons. On November 29, employee Betty McKenzie went to get tools near Simmons' work bench and she asked Simmons about buying a union T-shirt. Simmons said they were free and she would get one for her. McKenzie returned to work. Ten minutes later, McKenzie again went to the toolbox and this time Simmons asked her if she had signed a union card. McKenzie said no and Simmons asked her to sign one. McKenzie refused. They talked 3 to 5 minutes and McKenzie testified that she got mad, assertedly because she could not cut Simmons off. She reported the matter to the leadman and Simmons was given a written reprimand. This incident has great significance. In the first place, the conversation would appear to have been in keeping with the practice before August 27, 1979, as noted in footnote

[8] The complaint alleges that by issuing Casto the reprimand Respondent violated Sec. 8(a)(1) of the Act. I agree. As the rule was unlawful, its enforcement was unlawful absent a showing the reprimand was issued because of interference with production. No such showing was made.

[9] According to Bloom, Peterson complained of being harassed, but there is no evidence to that effect. Peterson did not testify. The complaint alleges that the issuance of the written reprimand was unlawful. As the rule has been found unlawful and there is no showing of any interference with production, I find that Respondent violated Sec. 8(a)(1) of the Act by issuing the reprimand.

4 above. Secondly, Simmons was at her work station and McKenzie was the first to initiate a union-related conversation with her. Despite these circumstances, and no showing of any adverse effect on efficiency or productivity, Simmons was reprimanded. McKenzie, who was not restrained by Simmons into continuing the conversation and who could have cut her off by simply returning to her work station, was not reprimanded.

On November 30, before lunch, employee Linda Young was getting work materials near Simmons' work area and Simmons engaged her in a conversation of no more than 5 minutes in which she solicited her to sign a union card. On December 4, Young had another union-related conversation with Simmons, at a time when Simmons was on the way from the restroom. This conversation lasted 1 or 2 minutes. Young admitted that the conversation was not unusual in terms of the prior practice. Because of these incidents with Young, Simmons was discharged.

In contrast with the foregoing, there is Respondent's handling of nonunion-related nonwork activity. For example, in November or December, employee Jerry Hanson was selling tools during working time and Supervisor Evans even assisted him by soliciting five employees to buy tools. This activity was eventually stopped, but no one was ever reprimanded.

James Gibbs testified to being solicited to buy Tupperware by employee Carol Denton in November, ordering glasses, and accepting delivery during worktime.[10] Gibbs did not report this to any supervisor, but he testified that Denton had brought in an armload of Tupperware and that Supervisor Dale McPherson had seen the bag of glasses he had purchased on his bench. McPherson asked what that was and when Gibbs told him, McPherson said okay. There is no showing Respondent ever stopped Denton, despite McPherson's apparent awareness.

Vicki Ingersoll had a similar experience involving the sale of Tupperware with employee Melanie Heatherton. In addition, Ingersoll testified that in December she and other employees were solicited to buy Christmas cards by employee Sandy Miller during worktime. Miller denied soliciting during worktime, but I do not credit her.

There is no direct evidence Respondent was aware of the activity described by Ingersoll, but its ignorance is in sharp contrast with its awareness of union activity and its handling of the incidents, and in my judgment, the evidence preponderates in favor of a finding of disparate enforcement of the rule.

In summary, I find on the basis of the record as a whole that Respondent's no-solicitation/no-distribution rule was violative of Section 8(a)(1) of the Act because it applied to breaktimes, and because the circumstances when it was enforced, and its disparate enforcement, demonstrate that the purpose of the rule was to interfere with, restrain, and coerce employees from engaging in union activity.

[10] According to Denton, Gibbs placed his order on lunchtime and she made delivery during nonwork time. I do not credit Denton whose answers to questions appeared to me to be less than candid. As a matter of fact, her testimony that she brought Tupperware into the plant and placed it on her workbench and that some employees would drop their orders while she was working tends to confirm Gibbs' testimony.

B. *The Discharge of Cecelia Simmons*

As above noted, Simmons was discharged for violating Respondent's no-solicitation rule. The complaint alleges that in discharging Simmons for this reason Respondent violated Section 8(a)(1) and (3) of the Act. I agree. In *Daylin, Inc., supra* at 281, the Board stated that ". . . if any employee is discharged for soliciting in violation of an unlawful rule, the discharge also is unlawful unless the employer can establish that the solicitation interfered with the employees' own work or that of other employees, and that this rather than violation of the rule was the reason for the discharge." Respondent made no such showing here.

The complaint alleges that Respondent also violated Section 8(a)(1) of the Act by its issuance of a significant incident report to Simmons on or about November 29, for the incident described above involving McKenzie. As the reprimand was for violating the unlawful rule and there was no showing of interference with production, its issuance constituted a violation of Section 8(a)(1) of the Act.

C. *Surveillance or Creating the Impression of Surveillance*

The complaint alleges that, from on or about November 8 to December 4, Respondent kept employees under surveillance. The allegation is based on the testimony of Cecelia Simmons that, before the beginning of organizational activity, there had been no restrictions on employees stopping at her work station and talking, but that after she had attended her first union meeting on November 7 it seemed that whenever anyone stopped and talked to her they would be listened to by supervisors and told to move. She named Supervisors Stifflemire, Kirby, Schuneman, and Starr as those who engaged in such conduct. Simmons testified this occurred on a daily basis until her discharge. The supervisors in question explicitly or implicitly denied engaging in surveillance of Simmons and gave explanations for the times they were in the vicinity of Simmons' work station. In my judgment, Simmons' testimony is much too general and conclusory in nature to support a finding of a violation and I shall dismiss the allegation of surveillance.

The complaint alleges four instances wherein Respondent created the impression of surveillance of the union activities of its employees. One instance involved alleged discriminatee Salvatore Bologna who admittedly was kept under surveillance by Supervisors Bruce Evans and Dale McPherson. However, I find that such surveillance was not related to any union activities of Bologna, but was directed to determining his times of arrival to and departure from work. Accordingly, I shall dismiss the allegation relative thereto.

Another allegation involves employee James Gibbs, who made the initial contact with the Union and began distributing union cards on August 24. Gibbs testified that, beginning with his activity, Supervisor Gary Helmer followed him to the restroom on several occa-

sions to the point that on one occasion he wagered with another employee that Helmer would follow him into the restroom and Helmer did.

On August 29, Gibbs asked Supervisor Chuck Zoller if he had assigned Helmer to follow him and Zoller replied, "No, I suppose you assigned him to yourself." Gibbs asked Zoller what he meant and "Are you afraid I'm going to pass out a union card or something?" Zoller answered, "Yes, that's the reason." On September 13, Gibbs told Zoller he would file charges if the Company did not get Helmer off his back.

Helmer denied that he followed Gibbs to the restroom and Zoller denied assigning Helmer to do so. Insofar as having any conversation with Gibbs about it, he testified that on one occasion as he was walking by Gibbs' machine Gibbs asked who Zoller was going to have follow him that day. Zoller testified he answered, ". . . it's your choice," and continued walking.

I conclude that, as between Gibbs and Helmer and Zoller, Gibbs is the more deserving of credence. In Helmer's case, his denial of knowledge that Gibbs was involved in union activity until after September is simply unbelievable. On August 23, he had reprimanded Gibbs for too much talking and being away from his machine and if he did not know then what was being discussed the inference is compelling that he learned quickly considering the fact that on August 27 Respondent republished its no-solicitation/no-distribution rule. In Zoller's case, I cannot believe that he would treat as lightly—joking, he said—as he said he did Gibbs' remark about being followed.

On the basis of Gibbs' testimony concerning Helmer's conduct and Zoller's remarks, I find not that Helmer created the impression of surveillance, but that he kept Gibbs under surveillance for the purpose of interfering with union activity.

The third allegation in this category is based on the testimony of former employee Criss Sexton that in mid-December he had a conversation with Zoller in which Zoller told him to be very careful that "they" were out to get him and employee Jimmy Gibbs. Sexton asked Zoller what the problem was and Zoller said, "You and I both know what the problem is . . . he says, not in your work . . . . As far as your work goes, you and Jim are superstars." Zoller told him he was spending too much time away from his machine and that when he was out talking he was talking about the Union. Sexton denied it, but Zoller said as far as Sexton's supervisor was concerned that is what he was talking about.

Zoller admitted to a conversation with Sexton which he testified came about at Sexton's request. Zoller testified that, shortly before this, Sexton had been reprimanded for being away from his work area and, on this occasion, Sexton expressed the concern that "they" were out to get him and he wanted to talk to Zoller because Zoller knew what was going on. Zoller told him it was not "they," that it was he and he was not out to get him, that he just wanted Sexton to do his job and stay away from coercing other employees. He asked him to stay at his machine. He told Sexton that anytime he was talking with another employee with whom he did not have a working relationship he was slowing down production. Zoller denied telling Sexton that anytime he saw him talking to other employees he considered him to be talking about the Union.

I credit Zoller. His testimony was far more detailed than Sexton's who initially did not even remember the major part of the conversation and had to have his recollection refreshed. Accordingly, there is no basis for finding that Zoller created the impression of surveillance of employees' union activities and I shall dismiss paragraph 13 of the complaint.

The fourth allegation in this category is based on a letter Respondent issued to its employees on January 30, 1980, following a hearing the preceding day on the Union's petition for an election. This letter stated, *inter alia*:

> We also believe you should know that, of all the employees who could have attended the hearing, only Jimmie Gibbs and Vicki Ingersoll were present. These are the people, or some of them, who would attempt to control things if the union were voted in. Is this what you want? Further, of all the employees the Union claimed to have as late as last Sunday (January 27) we were told that between 16 and 30 people attended the meeting of that day. This included several paid union organizers.

The complaint alleges that, by stating that it knew how many employees attended a union meeting, Respondent created the impression that it was keeping under surveillance the union activities of its employees. Respondent contends that a conclusion to such effect is not warranted because in its letter it indicated to the employees that it based its knowledge of the number in attendance at the union meeting on its having been told.

In my judgment, this does not overcome the tendency to coerce employees which inheres in a statement which discloses such detailed knowledge on the employer's part about a union meeting. Respondent did not disclose by whom it was told about the attendance at the union meeting, and, absent such disclosure, it would be reasonable for the employees to infer that Respondent had an informant in their midst and to be restrained and coerced thereby. I so find.

The complaint also alleges that by revealing the identity of employees attending a Board meeting, namely, Jimmie Gibbs and Vicki Ingersoll, Respondent coerced its employees because they exercised Section 7 rights. Nowhere in his brief does the General Counsel offer a rationale for this allegation. It is not even clear who is alleged to have been coerced. It appears that the intent of the allegation is that Gibbs and Ingersoll were coerced because the General Counsel states, in brief, they were exposed to unwelcome notoriety. I fail to understand the significance of the statement. As of the date of the representation hearing, according to the General Counsel's own assertion, Gibbs and Ingersoll were openly active on behalf of the Union. How then could the publication of their attendance at the hearing tend to coerce them? I find no merit to the allegation.

D. *Threats*

According to alleged discriminatee David Casto, about 7 p.m. on November 14, 1979, he jokingly asked Supervisor William Northrup if he had signed a union card yet and Northrup replied, "Dave, you know better than that," and "I had better not catch you with any union cards." Casto rejoined that what he carried or had in his toolbox was his own business. The complaint alleges that Northrup's remarks constituted a threat of disciplinary action. I shall dismiss the allegation.

According to Northrup, who admitted to being asked by Casto if he had signed a card, he told Casto he knew better than that, and that "I don't care to discuss it, I don't care to see cards, and that it wasn't a time or place for us to be discussing it." He denied threatening Casto with any disciplinary action if he was ever caught with a union card. I credit Northrup. I am persuaded that his remarks were not as described by Casto, whose version may have been an interpolation of the remarks, rather than an accurate restatement.

Another allegation that appears to fall in the category of a threat is based on statements by Bob Poutre, a management consultant employed by Respondent.

On or about February 8, 1980, Respondent laid off certain employees. On Tuesday, February 19, 1980, an article about the layoffs appeared in the newspaper, Today, a newspaper of general circulation in Brevard County, Florida. The article stated, *inter alia*, that the Labor Board in Tampa had received four complaints from about a dozen former employees of the Company who charged that their dismissals were tied to union leanings and Union Representative G. Ray Cox was quoted as saying that from the time the organizing campaign had started the company had continuously fired people for union activity. The article further noted that none of South Brevard's firms was unionized.

The following day, or shortly thereafter, Poutre held a meeting with employees at which he spoke about the layoffs. Poutre testified he told the employees they were to be congratulated because the layoffs were over and they still had jobs. Poutre referred to the Today article and its report of four charges that the company was going to hearing and he said, *inter alia*, the article scared him. He said what scared him most was about the laid-off employees, because the article said only union people were laid off (which he said was not true) and the article said further that none of Brevard's electronic firms was unionized. He said, ". . . what worries me is that the people that have been laid off from Documation that go out to try to find jobs are going to have paranoid personnel people out there that are not going to want to hire them, and I feel very badly for those people." Employees Harry O'Connor and Roger Brown also testified about Poutre's remarks. While their versions are somewhat different from Poutre's, I do not deem them to be significantly different.

The complaint alleges that Respondent violated Section 8(a)(1) of the Act by Poutre's remarks. Again the General Counsel has articulated no rationale to support the allegation and the theory of a violation is not self-evident. The remarks contained no threats of actions by Respondent against laid-off employees who were active on behalf of the Union and they would appear to be protected by Section 8(c).

Employee Gibbs testified that on or about January 25, 1980, Zoller told him that he felt that the Company was justified in discharging Oreland Johnson, an alleged discriminatee whose discharge is analyzed *infra*. Zoller said he understood Johnson had filed charges and that "you'll probably have more charges to file later in the week because I want to get another one of your people." Gibbs asked who and Zoller would not say.

While admitting that he and Gibbs talked about Johnson's discharge, Zoller denied telling him that any other union supporters were to be fired.

I credit Zoller. Gibbs' testimony relative to this conversation was rather sketchy on direct examination. For example, he did not disclose on direct that it was he who brought up the subject of Johnson's discharge and not Zoller. In addition, he admitted that Zoller had told him at one time or another that the Company felt that if it discharged one or more other employees either the employees or the Union might file a charge. It is perhaps this statement that Gibbs interpolated into that described above. In any event, I credit Zoller and shall dismiss this allegation.

According to Gibbs, he had yet another conversation with Zoller which, if not falling under the category of a threat, warrants consideration at this point. In this instance, Gibbs testified Zoller told him that the Union's efforts to gain the right to bargain collectively could drag out for years and that if the Union won an election it would be many years before they got a contract because the Company would bargain in good faith but very slowly.

Zoller admitted to a conversation with Gibbs in which he said these things can take years. However, he denied making any reference to collective bargaining. I credit Zoller and I shall dismiss the allegation based on Gibbs' testimony above.

E. *Solicitation of Grievances*

Paragraph 14 of the consolidated complaint alleges that on or about January 10, 1980, Respondent, acting through its agent, Bob Poutre, solicited grievances from its employees and impliedly promised that Respondent would correct those grievances. The only testimony adverted to by the General Counsel in his brief relative to this allegation is that of employee Victoria Ingersoll that she had several conversations with Poutre most of which involved, "Why we were interested in the union, what the problems seemed to be with the company" and that of employee James Gibbs that right before Christmas Poutre came to his work area and "He said, 'What's the problem?' Basically." Gibbs, and apparently another employee present there, Dave Preevy, told him the company didn't pay enough, did not have any fringe benefits, and employees did not like the way they were being treated. According to Gibbs, Poutre said he was surveying the shop to more or less find out what the main problems were, to see what he could do about them; to see if he could present his case to the Company in such a way he could do something to help solve these problems.

Gibbs asked him what would happen if the Company agreed to some of the employees' grievances while Poutre was there, and after he had left, "what would hold them to it." Poutre said, "Nothing."

The only issue presented by the foregoing is whether Poutre's conduct constituted unlawful solicitation of grievances. There is no allegation Poutre engaged in unlawful interrogation.

Poutre is a management consultant in employee relations retained by Respondent in mid-November 1979. He did not testify as to when he first arrived at Respondent's facility, but according to Gibbs and Ingersoll he was there in early December and it is clear he was also there in January. Poutre did not testify about any conversations with Ingersoll or any employees other than Gibbs. As to that, he testified to one conversation with Gibbs wherein he told Gibbs why he had been retained by Respondent; namely, to train supervisors on how to work with people, to find out what the problems were causing people to want to join the Union, and to report his findings to management. He testified that he never asked anyone what the problems were, nor did he solicit grievances, nor make any promises. He testified he told Gibbs and other employees that he had no authority to correct problems. According to Poutre, when Gibbs asked him what would happen after he left, he replied that he did not know if anything would happen.

The foregoing poses a difficult question. It is settled law that the solicitation of grievances by an employer in the course of an organizational campaign is unlawful if it is accompanied by promises to remedy the grievances or is conducted in such a manner as to imply that the grievances will be corrected.[11]

In this case, there is a question of fact as to whether Poutre even solicited grievances (or asked employees what the problems were, which can be said to be the same thing). According to Poutre, although his purpose, in part, in being in the plant was to find out what problems there were to cause people to want to join the Union, he did not ask the employees because they told him without his asking them. There is an element of sophistry in such testimony. It seems rather obvious to me that when you introduce yourself to employees as a consultant hired to find out the problems that would cause them to want a union you are asking them what those problems are. When employees told Poutre their problems, they demonstrated clearly that they understood why he was talking to them. In my judgment, whether one credits the account of Poutre or Gibbs, a finding is warranted that Poutre solicited grievances.[12]

As noted, in order to find the solicitation of grievances unlawful, it must be accompanied by a promise, express or implied, that the grievances would be corrected. In my judgment, Gibbs' account of Poutre's remarks clearly establish an implied promise of a remedy. I can place no other construction on such remarks as "to see what he could do about them; to see if he could present his case to the company in such a way he could do something to help solve our problems." Gibbs understood that a promise was being given, because he wanted to know what would happen after Poutre left.

For the foregoing reasons, I find that Respondent violated Section 8(a)(1) by soliciting grievances from employees and implying that it would remedy them in order to dissuade them from supporting or adhering to the Union.

F. *Alleged 8(a)(3) conduct*

1. The demotion of James Cleveland

Cleveland was employed in August 1979 and was promoted to leadman in later 1977 or early 1978. He was employed on the second shift, until June 1979, when the second shift was abolished and combined with the first shift. The supervisor of the shift was one Herb Ahlfelder and there was another leadman on the shift named Wolf.

On August 27, 1979, Cleveland signed a union card. He testified that he passed out union cards in the latter part of August and early September and began wearing a union T-shirt after September 20, 1979.

On September 20, he was told by Ahlfelder that he was being demoted from the position of leadman because there was no need for two leadmen on one shift. With the demotion came a reduction in rate of pay from $6.25 per hour to $5.90 per hour. Ahlfelder said he had tried to stop the demotion but had been unsuccessful.

The General Counsel contends that Cleveland was demoted because of his union activities. I conclude that the evidence is insufficient to warrant such a finding.

In effect, the General Counsel's proof consists of evidence of animus, Cleveland's union activity, and the timing of the demotion. It is questionable whether such evidence amounted to a *prima facie* case, but, assuming *arguendo*, that it did, it was overcome by the evidence adduced by Respondent as to the reason for Cleveland's demotion. Thus, Robert Cooper testified that it was he who made the decision to demote Cleveland. He testified that in the first or second week of June (which was before there was any union activity) he told Ahlfelder that due to the elimination of the second shift Cleveland should be reclassified. Wolf was to remain as leadman because he was more experienced and was regarded as a stronger leadman. (This is undisputed.) However, Ahlfelder advised Cooper that Wolf was considering leaving the Company. Because of this possibility and some uncertainty about the success of a one-shift operation, Cooper decided to wait a while. The plant had a vacation shutdown for the last week of June and the first week of July and Cooper went to Ireland from July 24 to September 7. He testified that on his return he reviewed the situation. It appeared that Wolf had decided not to leave and that the Company's production needs could be met with a one-shift operation. Accordingly, he told Ahlfelder to reclassify Cleveland. Cooper testified that such a reclassification was normal and, in fact, reclassification had recently occurred in another department.

[11] *Reliance Electric Company, Madison Plant Mechanical Drives Division*, 191 NLRB 44 (1971), enfd. 457 F.2d 503 (6th Cir. 1972).

[12] As between Poutre and Gibbs. I credit Gibbs. Poutre's equivocation about whether he asked employees about their problems did not reflect favorably on his credibility.

I was not impressed by Cooper, whom I discredited with regard to the discharge of Craig Redman discussed *infra*. Nevertheless, his testimony relative to Cleveland was uncontradicted and unimpeached in any way. True, none of his testimony was corroborated either by Ahlfelder or Wolf, nor were any records introduced to show that reclassifications and reductions in pay such as Cleveland's were customary in Respondent's operation. But the burden of proof is on the General Counsel who could have subpoenaed Respondent's records to show that it was not customary to demote employees and reduce their pay. Absent some evidence of disparate treatment, a finding of a violation is not warranted.

2. The discharge of David Casto

Casto was employed by Respondent in September 1976. In November 1979, he was employed as a quality control inspector on the second shift. He signed a union card on November 7 and he was active in soliciting other employees to sign cards. As noted earlier, on November 19, he was given a written reprimand for the asserted violation of the no-solicitation/no-distribution rule. On November 27, Supervisor Cuthbertson told Casto that, effective December 3, he was transferred to the first shift "for an attitude adjustment." Casto asked him what that meant and Cuthbertson said he did not know. Casto asked him to find out.

The foreman on the first shift was one Don Johnson. In February 1979, Casto had been working on the first shift under Johnson's supervision and he had asked to be transferred because he thought Johnson was incompetent. For this reason, on December 3, Casto tried to persuade Cuthbertson not to transfer him. He told Cuthbertson, "I cannot mentally do it," that is, work under Johnson. Cuthbertson insisted on the transfer and Casto quit.

The General Counsel contends that Casto's transfer was motivated by his union activities and that his quitting was, in law, a constructive discharge. Respondent contends that the transfer was attributable to the fact that Casto was disrupting the second shift and for the purpose of maintaining better supervision over him. Respondent also contends that Casto's asserted reason for refusing to accept the transfer is insufficient basis for holding his quitting to be a constructive discharge. I find no merit to Respondent's defenses.

The assertion that Casto was a disruptive influence on the second shift is based on testimony of Cuthbertson who testified that it began when Supervisor Lou Muth went on sick leave on November 27. Roy Early was appointed acting supervisor over Casto's objections. Casto assertedly complained constantly about the first-shift supervisor, Johnson, and first-shift leadman, Larry Hage and the Boggs brothers who were first-shift inspectors. Assertedly, Casto was going back and forth checking the work of the Boggs brothers to see if he could find anything wrong with it. He would recheck inspections and accuse the Company of passing parts that were not good. He would do this almost every day. According to Cuthbertson, when he told Casto of his transfer for an attitude adjustment, he explained that it was because of his constant bitching about the day shift. Casto was not satisfied and asked Cuthbertson to get a more specific definition and Cuthbertson said he would. On December 3, Cuthbertson tried to persuade Casto not to quit, but Casto said he was tired of being harassed.

According to Cuthbertson, he spoke to Casto on several occasions about his attitude and about reinspecting the work of others. Casto denied that he was ever spoken to about reinspecting work of others. He testified that anytime he made a reinspection it was on instructions of a supervisor.

As can be seen, Casto's case presents a serious credibility issue. If, as Casto testified, he did not inspect the work of others, except on instructions from supervisors, and if he was not reprimanded, then the asserted reason for his transfer was false, and if it was false, one must ask what the true reason was. In light of the timing of the transfer, shortly after an unlawful reprimand for assertedly violating the no-solicitation rule, the absence of any evidence as to what incident precipitated the action, which was taken on Tuesday, and the fact that the transfer would have placed Casto under a supervisor, Respondent knew he could not abide, the inference is warranted that the true reason for the transfer was Casto's union activities and that the transfer was made in order to cause him to quit.

I credit Casto because he impressed me very favorably with his candor and forthrightness. The one area of doubt was on the subject of his reinspection of the work of others and I conclude he was deserving of credence on this issue for a number of reasons. First of all, the evidence of his reinspections was very general. Cuthbertson never did specify precisely when Casto did so, how he learned of it, and what he did about it; rather, he made a general accusation. (Fellow employee Michael Noland's testimony was much the same and I give it no credence.) Second, no explanation was ever offered why Casto suddenly became disruptive. He had been on the same job since February 1979, and there is no showing that he was causing any problems until, if Respondent were believed, until after Supervisor Muth went on sick leave on November 27. The explanation that there was a change of supervisors is no explanation or Casto assertedly causing trouble with first-shift employees. It is noteworthy that, according to Casto's undenied testimony, when Cuthbertson told him of the transfer Supervisor Muth was present and told Cuthbertson he did not understand, that he had no problems with Casto. Third, if Casto was so disruptive, why was he not reprimanded in writing and given an opportunity to adjust his attitude? Respondent has demonstrated a readiness to reprimand employees in writing even without investigation where employees were assertedly violating the no-solicitation rule. Yet, it would have the trier of fact believe that a matter as serious as it described occurred without its issuing a written reprimand. Instead, it would have the trier of fact believe that it chose to remedy the situation by transferring an admittedly excellent inspector, in precipitate fashion, to work under the supervision of a man it knew he could not work with. This trier of fact cannot believe it.

For the foregoing reasons, I do not credit Respondent's assertions relative to the reasons for transferring Casto. In particular, I do not credit Cuthbertson that he

reprimanded Casto about reinspections. Inasmuch as I deem Respondent's asserted reasons for the transfer to be false, I find that he was constructively discharged in violation of Section 8(a)(1) and (3) of the Act. In making this finding, I reject Respondent's legal argument that Casto was not justified in quitting. Respondent had itself recognized the difficulty Casto had with Supervisor Johnson and had accommodated him by transferring him to the second shift in February 1979. In the circumstances, not only can Casto's quitting upon being told of the transfer back to Johnson's supervision be deemed a constructive discharge, but also the very fact that Respondent chose this means to solve an alleged problem with Casto indicates its unlawful motive.[13]

3. The discharge of Oreland Johnson

Oreland Johnson was employed on October 16, 1979. Shortly thereafter, he signed a union authorization card. He testified that he attended four or five union meetings and passed out union cards and handbilled. On November 23, 1979, he began to wear a union T-shirt to work.

On January 7, he was discharged by Supervisor Bruce Evans, who told him it was because of the quality and quantity of his production. According to Johnson, Evans told him he would not have discharged him had it been up to him. Johnson asked if it was because of his union activity and Evans repeated two or three times "Just between you and me, yes."

Johnson operated a "lap" machine which has the function of grinding small metal parts down to a desired degree of flatness. Johnson worked evenings, and on the day shift an employee named Snyder worked the same machine. A similar machine, smaller in size, was operated by employees Guiles and Swallich.

The General Counsel contends that the discharge of Johnson was attributable to his union activities and not to work deficiencies as asserted by Respondent. In support of this contention, he relies on Johnson's testimony concerning Evans' remarks when he terminated Johnson that "just between you and me, yes" it was because of union activity. Evans denied making such remarks and I credit him. I cannot believe that Evans would make such a remark. Johnson's assertion that Evans repeated the remark two or three times is just plainly unbelievable. Nor does it gain any credence when one considers the evidence relative to Johnson's productivity.

In this connection, the General Counsel asserts that company records show that Johnson's production was far greater than that of Snyder. The assertion is not supported by analysis of the records, however, and the General Counsel does not advert to the testimony relative to Johnson's scrap rate and the effect of scrap on productivity. I am persuaded that the testimony of Supervisors Zoller and Evans in this regard is deserving of credence.

In my judgment, the production records, Zoller's and Evan's testimony, and the fact that at the time of his discharge Johnson was nearing the end of his probationary period, a time when one can reasonably expect an employer to evaluate an employee, are factors which rebut any claim of discriminatory motive. Moreover, although Johnson was active in the Union, it does not appear that this activity was significantly different from that of Snyder and Guiles who also wore union T-shirts.

For the foregoing reasons, I shall dismiss the allegation that Johnson was discharged because of his union activity.

4. The discharge of Salvatore Bologna

Bologna was employed on January 4, 1979. He was employed as a utility person, cleaning machines, mopping floors, and the like. Initially, his hours of work were from 9 a.m. to 3:30 p.m. In February, Bologna requested more hours of work and Manager Zoller agreed to let him work from 3 a.m. to 3 p.m.

Respondent does not use timeclocks. Employees make out their own timecards. On January 24, 1980, Bologna was called into Zoller's office where he was shown a paper listing 7 days when he had misrepresented the hours he had worked in the amount of 7.4 hours equal to $54.76 in wages and he was told he was terminated.

The General Counsel contends that Bologna's discharge was attributable to his union activities and not any improper claim for hours not worked. The contention depends entirely on Bologna's credibility. I was not impressed by Bologna and I do not credit him. The burden of Bologna's testimony was that, in exchange for forgoing any shift pay differential, and lunch and coffee breaks, Zoller agreed he could work less than 12 hours and still claim 12 hours. Zoller denied making any such agreement. Such an agreement is clearly fraught with the possibility of abuse, and I cannot believe Zoller was party to one. I find, rather, that Bologna was shown to have recorded hours of work in excess of those actually worked and the General Counsel has adduced no evidence to support a finding that his discharge was attributable to his union activities, rather than the incorrect record of hours. Accordingly, I shall dismiss the allegation that Bologna's discharge was violative of the Act.[14]

5. Craig Redman

Redman was employed in June 1976 and discharged on February 6, 1980. He was active on behalf of the Union, signing a union card, passing out union cards, and wearing a union T-shirt.

On February 6, 1980, fellow employee Craig Wyles was in the process of collecting his personal tools from Redman's toolbox because he was being laid off. Redman asked him what he was doing and Wyles told him he was being laid off. According to Redman, he told Wyles if he wanted his job back to take his union T-shirt off, get down on his hands and knees, and "kiss the Compa-

[13] One item of evidence offered by the General Counsel relative to Casto's discharge was testimony from employee James Gibbs that, 2 weeks after Casto quit, Supervisor Chuck Zoller told him it was a shame Casto got mixed up in the union activity and lost his job, because he was a good inspector. Zoller admitted such a conversation with Gibbs but denied reference to Casto's union activities. I see no need to resolve the issue, because whether or not Zoller made the remark is not relevant to the issue of Casto's case, inasmuch as Zoller was not shown to have been involved in Casto's transfer.

[14] In reaching this conclusion, I have considered the somewhat clandestine manner that Bologna was kept under surveillance and I deem that circumstance insufficient to warrant a different result.

ny's ass," and he would probably get his job back. Production Supervisor Dale McPherson had accompanied Wyles to the toolbox and overheard the remark. Shortly thereafter, Redman was called to the office and discharged for insubordination.

The General Counsel contends that the incident of February 6 was used as a pretext by Respondent to discharge Redman because of his union activities. Respondent contends that Redman's remark, made during a companywide layoff in the immediate vicinity of employees who were being laid off, and in the presence of a supervisor, was a serious insult to the Company and serious insubordination justifying his discharge.

In my judgment, Respondent's contentions border on the frivolous. I have just described above the constructive discharge of David Casto who had openly displayed contempt for Supervisor Don Johnson under circumstances that must have been known to many employees and were certainly known to Respondent, yet, at Casto's request, it had transferred him in February 1979, so he would not have to work with Johnson. In light of its tolerance of Casto's attitude, its professed sensitivity in Redman's case can hardly be credited. The claim that Redman was guilty of insubordination finds no support in the record. Redman was neither disobedient nor even disrespectful. As the record clearly show, Redman was not addressing McPherson; he was addressing Wyles. As to the circumstances that the remark was made during a layoff and was overheard by other employees, there is no showing whatsoever that this was of any significance. Respondent's attempt to conjure up a setting filled with tension and a "very touchy thing" is a fiction unsupported by any evidence.

In the final analysis, the question presented is Respondent's motive in discharging Redman. As Respondent correctly notes, an employer may discharge an employee for a good reason, a bad reason, or no reason, and it is the burden of the General Counsel to establish that the reason is a prohibited one; namely, union activity.

There are several factors that support the General Counsel's burden. It is clear that Respondent entertained animus against the Union from the other findings herein made. It is also clear that Redman was a union adherent and it is undisputed that Respondent knew it.[15] In the circumstances, if the asserted reason for discharge is shown to be false, a finding that the true reason is the employee's union activity is warranted.

The conclusion that Redman was discharged because of his union activities depends in large part on Manager Robert Cooper's credibility and I do not deem him to be credible. His characterization of the situation existing at the time of Redman's remark defies credulity. As noted earlier, not one shred of evidence supports his description of the scene as "a very touchy thing." Employees Nancy Kracht and Alice Rebham who testified on behalf of Respondent about overhearing Redman gave no indication that there was any tension whatsoever which Redman's remarks would have increased.

In addition to this attempt by Cooper to color the situation, there is the circumstance of the precipitate manner in which the discharge was effected. Redman had been employed since June 1979 and was receiving top rate of pay for his classification, yet he was not offered any opportunity to explain his remarks or to retract them. This was in striking contrast to Cooper's handling of a situation involving one Goggins about a year earlier. According to Cooper's own description of the incident, this Goggins had disagreed with the way a particular job was being done and had gone to his supervisor. He ended in an argument with his supervisor and called the supervisor an obscene name. Cooper was called and "I came down and sent the supervisor on his way. I had to try and *settle* the situation that was on hand and I asked the employee or told him that this kind of conduct just would not be tolerated, you know, and then he proceeded to tell me that there was no way that he could be fired." Goggins then repeated his obscenity and was discharged. As already noted, Redman, whose conduct was in no way comparable to Goggins, was not offered any opportunity to retract his statement.

There is yet another aspect of Goggins' case which lends support to a finding that Redman's discharge was unlawfully motivated. Respondent's Exhibit 4 describes the incident that led to Goggins' discharge. In the background and comments, it is noted Goggins had a continuing attitude problem, including the use of heavy abusive language to all he comes in contact with, "his fellow workers, supervision, management, and the company." Despite this, his discharge was referred to as follows: "Although this discipline is severe, Goggins has been warned as recently as October 1978, and has a documented record and reputation of similar job attitude problems." Redman was not shown to have a background such as Goggins; yet the ultimate discipline of discharge was not only deemed not to be severe, but it was also administered precipitately.

In short, in light of Respondent's animus, the false explanation for its handling of Redman's remarks, and the precipitate manner of his discharge and disparate handling of the situation as compared with Goggins, I find that the General Counsel has made a *prima facie* showing

[15] If Redman is credited, Respondent had expressed its animus against him because of his union activities by statements of Supervisor McPherson. Thus, according to Redman, McPherson had told him that he was going to get into trouble wearing a union T-shirt and to "take the stupid thing off while you've got a chance." On one occasion, in McPherson's office, McPherson suggested Redman take the T-shirt off and Redman said it was too late, to which McPherson added, "You're right. You're already on the blacklist." According to Redman, on the day of his discharge, on the way to the office, he told McPherson, "I guess it's because of this union shirt," pulling at the shirt. McPerson said, "Well, I had warned you about that." The forgoing was essentially denied by McPherson. He admitted to riding Redman about what he wore, but not about the T-shirt, and he never told him to take it off and that he was on the blacklist. Nor did he tell Redman on the day of his discharge that he had warned him. I credit McPherson. There are too many unexplained circumstances that tend to discredit Redman. For one thing, he claimed to have had perhaps 10 conversations with McPherson, yet he remembered but 2. More importantly, according to McPherson's uncontradicted testimony, he was not even on Redman's shift between September and mid-January which was when he became second-shift supervisor. In the circumstances, it is difficult to conceive how he could have had the many conversations with Redman which Redman claimed to have had. Moreover, other employees wore T-shirts and there is no explanation why McPherson would have singled out Redman for his remarks. Given these circumstances, I credit McPherson.

that Redman's discharge was attributable to his union activities. I further find that Respondent has not submitted any evidence to overcome such *prima facie* case. Accordingly, I find that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Redman.

There is an alternative ground for finding Respondent's discharge to be unlawful. According to Respondent, Redman was discharged for his remark. If, in making that remark, Redman was engaged in protected activity, his discharge must necessarily be unlawful. Respondent contends that Redman's remarks were caustic and insulting and served no interests of the Union. I do not agree. The remarks were clearly related to the Union's campaign and Redman's perception of the employees' need for union representation. According to that perception, toadying up to management was a way to keep your job. With union representation, that would not be the case. Accordingly, I find that in making his remarks he was engaged in protected activity, and in discharging him for such reason Respondent violated Section 8(a)(1) and (3) of the Act.

6. The discrimination against Victoria Ingersoll

Ingersoll was employed in March 1978 and at the times relevant to the allegations of discrimination against her was working as a quality control inspector under the supervision of Robert Dabney.

On October 18, Ingersoll strained her back pushing a large printer and was absent from work for 3 days. When she returned to work, she was assigned to inspecting subassemblies in the assembly area only instead of conducting inspections in the general plant area. After a few days, she asked Dabney to be permitted to resume her prior inspection routine, but Dabney refused, telling her it was for her own safety. Despite Ingersoll's assurance that her doctor had placed no restrictions on her, Dabney would not change his mind.

On April 3, 1980, Ingersoll received a pay increase of 7 cents an hour. On April 15, 1980, Ingersoll was laid off for lack of work.

The complaint alleges that Respondent violated the Act by assigning Ingersoll to less desirable work on October 18, by granting her a raise of only 7 cents per hour on or about April 3, 1980, and by laying her off on April 15, 1980.

As to Ingersoll's assignment to less desirable work, two questions are presented: Was the assignment made because of Ingersoll's union activities and was the work less desirable. As to the first question, Respondent contends the assignment could not be attributable to Ingersoll's union activities because Dabney, who made the assignment, had no knowledge that Ingersoll was engaged in union activities. I do not credit Dabney's denial of knowledge of Ingersoll's union activities. If there is one thing clear on the record in this case, it is Respondent's alertness to the union activities of its employees. One needs only to refer to the discussion earlier relative to the no-solicitation/no-distribution rule and Respondent's conduct therein described. When one reviews how quickly Respondent learned of the organizational activity, and how quickly it responded to it, it defies credulity to believe that Dabney would not have known of Ingersoll's union activities, particularly in her work area. If there were any doubt it had knowledge, it would be removed by the patently pretextual reason assigned by Dabney for the change in her work assignment. That fact alone supports an inference of company knowledge.[16]

According to Dabney, he reassigned Ingersoll for her safety and the Company's protection. He did so not only because of the injury she sustained on October 18, but also because of prior accidents. In November 1978, Ingersoll had injured herself on the stairs, and in or about December 1978, she had broken her ankle stumbling over a box. But her injury on October 18 was not an accident of that type. Ingersoll injured herself when she undertook to push a large printer. She did not stumble; she did not trip. Moreover, she did not have to push the printer as part of her duties. Thus, whatever had happened with Ingersoll in the past was irrelevant to what happened on October 18. In the circumstances, I do not credit Dabney's testimony that he assigned Ingersoll to the assembly area for safety reasons; rather, I find that this was a false reason which was asserted to conceal the real reason; namely, Ingersoll's union activities.

The next question is whether or not the work to which Ingersoll was assigned was less desirable. According to Ingersoll it was, because in her new assignment she stayed in one area and inspected cable harnesses and small parts, work which was far less interesting than the work in her old assignment in which she inspected subassemblies in all work areas. Moreover, she testified without contradiction that she had been working 10 hours per week overtime on her old job and she received no overtime on the new one. On the basis of this testimony, I find that the assignment was to less desirable work and, as it was attributable to Ingersoll's union activities, I find that Respondent thereby violated Section 8(a)(1) and (3) of the Act.

The allegation relative to the raise given Ingersoll on April 3, 1980, is somewhat unusual in that it is alleged to be unlawful because it was smaller than the raise given to employee Melanie Heatherton, another inspector, who received a pay increase of 42 cents an hour at or about the same time. It is alleged that the reason for the disparity is the fact that Ingersoll was a union supporter and she had testified against Respondent in the initial hearing before me in these cases whereas Heatherton had testified on behalf of Respondent.

I find no evidence to support a finding that the amount of the raise given to Ingersoll was in any way related to her having given testimony under the Act. The mere fact that Heatherton received a substantially larger increase is insufficient to support such a finding, but, in any event, Respondent adduced evidence explaining why Heatherton received such a substantial increase.

This does not necessarily mean that Ingersoll may not have been discriminated against in the decision to give her only a 7 cents per hour raise. Apart from the Heatherton comparison, there may be other indicia of a dis-

[16] *Sam Tanksley Trucking, Inc.*, 198 NLRB 312 (1972).

criminatory motive.[17] Thus, to begin with there is the fact that during much of the rating period, since on or about October 23, she had been on a job to which she had been assigned for discriminatory reasons as found above. There is the fact that since her employment with Respondent, and prior to her April 1980 evaluation, she had received three merit increases, one of 5.1 percent, one of 7.4 percent, and one of 5 percent. The April 1980 increase was of 1.8 percent. Such a disparity, in the context of a discriminatory assignment, is *prima facie* proof of discriminatory motive.

To rebut that proof all that appears is the opinion of Supervisor Dabney that Ingersoll's performance was unsatisfactory with respect to her attitude, dependability, and quantity of work. In this connection, Dabney offered little concrete evidence beyond an instance when it assertedly took Ingersoll all day to perform a reinspection that should have taken 30 to 45 minutes. According to Ingersoll, any reinspection assignment she received had to be performed concurrently with assignments on the "hot" shelf and this would account for delay. In any event, granting that Ingersoll's productivity may have dropped, it is undisputed that at no time during the rating period was she reprimanded, verbally or in writing, including when she assertedly took all day to do a 30- to 35-minute assignment. The absence of a reprimand suggests that any drop in production was of small proportion.

Whether small or 50 percent as Dabney testified, the cause appears to have been rooted in the discriminatory assignment itself. As Ingersoll credibly testified, Dabney asked her what the problem was and she answered she was bored and would like to return to her original job. She told him she was not aware she had slackened in production.

In short, Ingersoll's poor evaluation was the outgrowth of her discriminating assignment and, when one considers that her performance was not so poor as to justify reprimands, and that the judgment of her merit was made by the individual who had initially discriminated against her, a finding is warranted that the merit rating was tainted and attributable to her union activities.

The foregoing conclusion relative to Ingersoll's raise is predictive of the conclusion to be reached regarding the allegation that her selection for layoff was discriminatorily motivated. The selection was made by Dorsett who, as Dabney's superior, had participated in the earlier discrimination against Ingersoll. According to Dorsett, on April 11, 1980, he was told that his supervisor was being laid off, that of four managers he was the only one not being laid off, that he was being relieved of certain departments, and that he was to reduce expenses in the remainder of his area of responsibility to the fullest extent possible consistent with production of a quality product.

Dorsett proceeded to rate the nine hourly rated employees in his department. The particular area where Ingersoll worked included three other employees and Dorsett ranked Ingersoll lowest of the four. That same day, Dorsett advised two other employees (not shown to be union adherents) and one supervisor that they were being laid off. Ingersoll was not advised that day because she was on leave of absence. When she reported to work on April 15, she was advised she was being laid off.

In rating Ingersoll and the other employees, Dorsett used an evaluation form which rated employees as excellent, good, acceptable, or unacceptable, relative to six factors. Of the four employees in her work area, Ingersoll was the lowest ranked because of her quantity of work, dependability, adaptability, and attitude. However, employees had no production quotas and Dorsett's judgment of the quantity of work produced by Ingersoll was not based on any data. It was based on the assertion that whenever he was on the floor Ingersoll was looking at him instead of working!

As to adaptability, the rating form refers to whether a worker "requires detailed instructions on new tasks and methods." Dorsett did not specify a single instance when Ingersoll required detailed instructions. As he stated, ". . . she does not work for me directly." It would appear, therefore, that there was no factual basis for his rating on his factor. On dependability, Dorsett rated Ingersoll between good and acceptable, a poor rating. Again, he had no facts on which to base the rating. The only justification for the rating was "how clean is clean?" (On cross-examination, he was asked about Ingersoll's attendance and intimated that was a factor in her rating, but no evidence was offered regarding her attendance or that of other employees, and the dependability factor as it appears on the evaluation form does not appear to relate to attendance.) As to attitude, he rated her marginally acceptable, again with no instances of conduct reflecting a poor attitude.

In short, if Ingersoll deserved the rating she received it can only be because Dorsett said so, and not because there is objective evidence to support it. Given the demonstrated animus and discrimination against Ingersoll previously described, it hardly seems necessary to say that Dorsett's rating of Ingersoll cannot be accepted as a defense to her selection for layoff. His testimony does not constitute evidence of a legitimate motive; rather, it amounts to nothing more than a denial of discrimination. In my judgment, Dorsett was not a credible witness and his assertions can be given no weight.

For the foregoing reasons, I find that Ingersoll's selection for layoff was attributable to her union activities and that Respondent thereby violated Section 8(a)(1) and (3) of the Act. However, I deem the evidence insufficient to warrant a finding that Ingersoll's layoff was attributable to her having given testimony under the Act, and I shall recommend dismissal of the 8(a)(4) allegation.

7. The layoffs

On or about February 8, 1980, Respondent laid off employees Richard Kise, Herb Fernandez, Paul German, David Thompkins, and Chris Tomlin. It is undisputed that the layoffs were dictated by economic necessity, but

[17] The fact that the General Counsel alleged a violation solely on the basis of a comparison with Heatherton does not preclude a finding of a violation on the basis of a different theory where the issue of the amount of the raise given Ingersoll has been fully litigated. *Liberty Nursing Homes, Inc., d/b/a Liberty House Nursing Home of Lynchburg*, 245 NLRB 1194 (1979).

it is contended that the five named employees were discriminatorily selected because of their union activities.

The contention that the five named employees were discriminatorily selected is predicated largely on the fact that the five employees were all known union adherents,[18] and they had more seniority than the employees who were retained. The record does not reflect the seniority of all the employees in the material control unit of which the five employees formed a part, but it does reflect the seniority of the 12 lowest ranked employees (G.C. Exh. 22), and Thompkins had more seniority than the 6 employees on that list who were not laid off; German had, more seniority than 3 of them; Kise had more seniority than 5 of them; and Tomlin and Fernandez had more seniority than 2 of them. Moreover, on or about February 5, the night shift had been eliminated and five night-shift employees had been transferred to the first shift. One of these (Kirt Jensen) had been hired as recently as December 1979 and it appears from Supervisor Robert Hopkins' testimony that three others had been hired as recently as October 1979. None of these was known to be a union supporter (none wore a union T-shirt) and none was laid off.

In my judgment, Respondent's animus against the Union, including its willingness to violate the Act to prevent the unionization of its plant as shown by the unfair labor practices herein found, and the facts that of six employees laid off in this department five were union adherents and employees who were probationary, or had barely finished their probationary periods, were retained, are sufficient to support an inference in the cases of Kise and Thompkin that union activities were a motivating factor in their selection for discharge, and the burden was on Respondent to demonstrate that they would have been selected for layoff even had they not engaged in union activities.

To meet its burden, Respondent adduced testimony from its officials that seniority is not a factor in selecting employees for layoff. In my judgment, this is an insufficient answer to the charge of discriminatory selection. Of course, Respondent has the right to select the criteria it will follow in making layoffs, but seniority is an attribute of employment so commonly considered in making selections for layoff that where an employer's motive is at issue it is appropriate to ask why the employer selects senior employees for layoff instead of junior employees. Implicitly at least, Respondent acknowledges the validity of such an approach because it undertook to explain why the five alleged discriminatees were selected for layoff.

According to Jeffrey Baugher, director of materials and manufacturing systems, in the first week of January he told the managers under his supervision to rate their employees in order of ability, performance, attitude, and growth, for possible use at a later date in the event of a layoff. Arnold Rowland, material control manager, then told Robert Hopkins to rank the employees under his supervision from worst to best. Hopkins did so and he rated the five alleged discriminatees at the bottom of the list. He gave the list to Rowland who made a combined list to include other departments under his supervision. The list included 12 names, and Rowland had to lay off 6.[19] Accordingly, as the five alleged discriminatees were the lowest rated, they and one Steve Napier were laid off.

According to Hopkins, he rated the employees on the basis of four or five criteria: amount of supervision required, speed, attitude, attendance, and willingness to work overtime. In Kise's case, he was rated low because of his attitude and being disruptive. Hopkins gave examples of specific instances which, in my judgment, were so minor that it is difficult to believe that they formed a basis for a selection for layoff in light of the facts that Kise's conduct was never regarded seriously enough to warrant a written warning and, more importantly, that almost contemporaneously with the giving of the low rating, Kise had been given a 5-percent merit raise. Accordingly, I conclude that Respondent has not rebutted the *prima facie* case established by the circumstances described above, and that Kise was selected for layoff because of his union activities.

In the case of Thompkins, he was rated low assertedly for being a slow worker and requiring constant supervision. However, no instances of specific conduct were given to support the assertion, and the record indicates no verbal or written warnings having been given to Thompkins, who had been given a 4-percent merit raise in November. In light of these facts, while Thompkins may have had deficiencies, it strains credulity to believe that his work performance warranted a lower rating for purposes of retention than probationary employees, and I conclude that the evidence adduced by Respondent was insufficient to overcome the inference that Thompkins' selection for layoff was attributable to his union activities.

In the cases of Fernandez, German, and Tomlin, there is insufficient evidence to warrant an inference that union activities were a motivating factor in their selection. None of the three had significant tenure with Respondent and from their wage rate appear to have been among the lowest paid employees and were not shown to have received any merit increases. In Fernandez' case, he had been given a significant incident report on January 24, 1980.[20] Accordingly, I shall recommend dismissal of the allegation relative to their layoff.

[18] All the laid-off employees except Tomlin testified they had signed union cards and had worn union T-shirts at work, and Robert Hopkins, their supervisor, admitted that he had noticed all the laid-off employees wearing the union T-shirts from time to time. Contrary to Respondent's assertion in brief, therefore, there is proof of company knowledge.

[19] Actually, he had to lay off seven, but one employee, Mike Boring, had been terminated on January 21, so Rowland felt he needed to lay off only six.

[20] The complaint alleges that the issuance of the significant incident report was violative of the Act, apparently because it was issued 2 days after Fernandez first wore a union T-shirt. I find the evidence insufficient to support a finding of a violation. According to Hopkins, the report was precipitated by Fernandez' conduct on January 23, in reading a newspaper when he should have been working and his slowness in filling a particular order. Fernandez testified he disagreed with Hopkins' criticism, but did not specifically refute Hopkins' assertions. Despite my conclusion that Hopkins was not a credible witness on other matters, I credit him relative to this issue.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section I, above, occurring in connection with its operations described herein, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent violated Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the polices of the Act.

As I have found that Respondent discharged Cecelia Simmons, David Casto, and Craig Redman because of their union activities, and that it selected Vicki Ingersoll, Richard Kise, and David Thompkins for layoff because of their union activities, I shall recommend that it be ordered to offer them immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and to make them whole for any loss of earnings they may have suffered by reason of their unlawful discharge or layoff by payment to them of a sum of money equal to that which they normally would have earned as wages from the date of their discharge or layoff to the date of the offer of reinstatement, less net earnings, to which shall be added interest, to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[21]

As to the unlawful assignment of Vicki Ingersoll, I shall recommend that she be returned to her former assignment and that she be made whole for any loss of overtime as a result of her unlawful assignment.

As to the discrimination in the amount of her merit increase, there is no specific formula to apply to determine the amount of the increase she would have received but for the discrimination against her, and the record affords no data, apart from Ingersoll's record of increases, on which to base an appropriate formula. In the circumstances, it shall be left to the compliance stage to determine an appropriate formula.

As to the significant incident reports issued to employees for violating the unlawful no-solicitation rule, I shall recommend that Respondent be ordered to expunge them from the employees' records.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Association of Machinists and Aerospace Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By promulgating and enforcing a rule which, in effect, prohibited union solicitation and distribution of union literature during break or rest periods, or periods when employees were privileged to stop work, by enforcing the rule in a disparate manner against employees soliciting on behalf of the Union, by reprimanding employees and issuing significant incident reports to employees in the enforcement of the rule, by prohibiting employees from talking to employees with whom they have no working relationship, by soliciting employee grievances and impliedly promising to redress them, by questioning employees about their union activities, by threatening employees with discharge because of their union activities, by keeping employees under surveillance, and by creating the impression of surveillance of employees' union activities, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

4. By discharging Cecelia Simmons, David Casto, and Craig Redman, by assigning Vicki Ingersoll to less desirable work, by limiting the amount of her raise, and by laying her off and laying off Richard Kise and David Thompkins, because of their union activities, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[22]

The Respondent, Documation, Incorporated, Palm Bay, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees about their union activities in a manner constituting interference, restraint, and coercion of employees in their exercise of Section 7 rights.

(b) Engaging in surveillance of employees by following them on rest breaks.

(c) Creating the impression of surveillance of the union activities of its employees by telling employees that it knows how many employees were in attendance at a union meeting.

(d) Soliciting employee complaints and grievances and impliedly promising to remedy them to induce employees to withhold assistance and support from International Association of Machinists and Aerospace Workers, AFL-CIO, or any other labor organization.

(e) Threatening employees with discharge for engaging in union activities.

(f) Issuing significant incident reports to employees for engaging in union activities.

(g) Prohibiting employees from talking to other employees with whom they have no working relationship.

(h) Maintaining in effect and enforcing a rule which prohibits union solicitation and distribution of union lit-

[21] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[22] In the event no exceptions are filed as provided in Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

erature during break or rest periods, or periods when employees are privileged to stop work.

(i) Enforcing any rule against solicitation and distribution of literature in a disparate manner against employees soliciting on behalf of the Union.

(j) Discouraging membership in, or activities on behalf of International Association of Machinists and Aerospace Workers, AFL-CIO, or any other labor organization of its employees, by laying off and discharging employees and by assigning employees to less desirable work, because of their activities on behalf thereof, or otherwise discriminating in regard to the hire or tenure of employment or any terms or conditions of employment of its employees.

(k) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, and to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection guaranteed by Section 7 of the Act, or to refrain from any or all such activities.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Offer Cecelia Simmons, David Casto, Craig Redman, Vicki Ingersoll, Richard Kise, and David Thompkins immediate and full and unconditional reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered by reason of the discrimination against them by payment to them of a sum of money equal to the amount they normally would have earned as wages from the date of their discharge or layoff to the date of their reinstatement in the manner set forth in the section entitled "The Remedy."

(b) Rate Vicki Ingersoll's job performance for the 6-month period preceding April 1980 in a manner, and, under circumstances, free of unlawful considerations of union membership or activities and make her whole for any loss of pay suffered by reason of the unlawful rating of April 3, 1980.

(c) Assign Vicki Ingersoll to the duties she was performing on or before October 18, 1979.

(d) Make Vicki Ingersoll whole for any loss of overtime she may have suffered by reason of her discriminatory assignment on or about October 21, 1979.

(e) Remove from the personnel files of Cecelia Simmons, David Casto, and Jimmy Gibbs the significant incident reports issued because of their union activities.

(f) Preserve and, upon request, make available to the National Labor Relations Board and its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records relevant and necessary to a determination of the amounts of backpay due under the terms of this Order.

(g) Post at its Palm Bay, Florida, facility copies of the attached notice marked "Appendix."[23] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by the Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(h) Notify the said Regional Director, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the allegations of the complaint found not to have been sustained by the evidence be dismissed.

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[23] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."